

Congressional Election Observation and Contested Elections: A Primer

March 2023 | 118th Congress, First Session¹

Introduction

This staff memorandum describes the process by which the U.S. House of Representatives acts as the judge of its own elections pursuant to Article I, Section 5, clause 1 of the U.S. Constitution. The memorandum first describes the underlying constitutional authority for the House to judge its own elections, then provides a history of the House’s judging power, as well as a description of the Committee on House Administration’s election observer program.

1) Background and Constitutional Authority

The Constitution vests substantial and broad authority in Congress with respect to federal elections, including to hear and decide contests brought to challenge the results of congressional elections that have been certified by the States. Article I, Section 5, clause 1 of the U.S. Constitution provides that, “Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members.”² Article I, Section 4, clause 1 provides that, “The Time, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.”³ As a preeminent constitutional and elections law scholar recently described this authority at a hearing of the Committee on House Administration:

In a word – one the U.S. Supreme Court has used repeatedly for 142 years – Congress’s power over congressional elections is “paramount.” Under the unambiguous text of the Elections Clause and a long line of Supreme Court precedent, Congress has broad plenary authority to regulate the time, place, and manner of conducting congressional elections. The most recent explication was Justice Scalia’s opinion for seven justices in *Arizona v. Inter-Tribal Council of Arizona* back in 2013 where he referred to the “broad” and “comprehensive” scope of the Elections Clause power.⁴

In addition to the broad and comprehensive authority vested in Congress under the Elections Clause, “Under express provisions of the U.S. Constitution, the final authority over the ‘Elections, Returns and Qualifications of its own Members’ is clearly lodged within each House of Congress.”⁵ Thus, “[t]ogether, ‘these two sections invest Congress with near-complete

¹ Prepared by Committee on House Administration Minority Staff for Ranking Member Joe Morelle.

² U.S. CONST. art. I, § 5, cl. 1.

³ U.S. CONST. art. I, § 4, cl. 1.

⁴ *The Elections Clause: Constitutional Interpretation and Congressional Exercise: Hearing Before the H. Comm. on House Admin.*, 117th Cong. (2021) (statement of Daniel P. Tokaji, Fred W. & Vi Miller Dean and Professor of Law, University of Wisconsin Law School).

⁵ L. Paige Whitaker, *Contested Election Cases in the House of Representatives: 1933 to 2009*, CONG. RES. SVC., Nov. 2, 2010.

authority to establish the procedures and render final decisions relating to the election of its members.”⁶

The House has been vested with this authority – and responsibility – from our nation’s very beginning, and it has consistently and regularly exercised it from the First Congress through the One Hundred Eighteenth Congress.

2) A History of Contested House Elections

Over our history, election contests have remained a normal and regular part of the biennial process for electing, recognizing, and seating new Members of the House. Although Congress has opted to revise the statutory framework by which it considers election contests, consideration of such contests has been a regular and recurring part of the House’s constitutional prerogatives and work. Across our nation’s history, approximately 613 elections have been contested in the House – an average of more than 5 per Congress.⁷

Although the authority for the House to determine its own election results was clearly established by the Constitution and exercised immediately in the First Congress, since then, Congress has continued to refine a statutory framework to provide guidelines for how elections contests are to be considered and resolved. Initially, the Committee on Elections was guided by informal practice and precedent. Then, “[i]n 1798 the Fifth Congress (1797-1798) enacted a statute governing the process and procedures relating to contested elections. This statute expired at the end of the First Session of the Sixth Congress (1799-1800).”⁸ A half century later, “[i]n 1851, Congress enacted a second contested election statute, which, with the exception of minor amendments made in 1860, 1873, 1879, and 1887, remained substantially unchanged until enactment of the Federal Contested Elections Act of 1969.”⁹ The Federal Contested Elections Act (FCEA), which was last updated more than 50 years ago, remains the primary statutory framework which guides the House in considering elections contests today.

This memorandum provides a brief overview of that long history, including its roots in English parliamentary practice, early practice in the First Congress, and subsequent statutory developments. It also provides general information about the number of contested election matters in the House.

A) Contested Elections in England and the Colonies

At the time the Framers drafted the Constitution, the practice of reserving to legislative bodies the authority to determine the election of their members had long been established as an important prerogative in both England and, later, the Colonies. In England, “the control by the legislature of the election of its own members originated as a defense against executive

⁶ COMM. ON H. ADMIN., A HISTORY OF THE COMMITTEE ON HOUSE ADMINISTRATION: 1947-2012 115 (2012).

⁷ See Sean J. Wright, *The Origin of Disputed Elections: Case Studies of Early American Contested Elections*, 81 ALB. L. REV. 609, 611 (2018).

⁸ COMM. ON H. ADMIN., A HISTORY OF THE COMMITTEE ON HOUSE ADMINISTRATION: 1947-2012 115 (2012).

⁹ *Id.*

encroachments.”¹⁰ From the sixteenth century, “the House of Commons asserted that it was the sole judge of the election returns of its members and that neither the King nor any court could overrule the decision of the Commons on election contests.”¹¹ The institutional significance of “ultimately deciding their own elections” in the English system “came to be regarded . . . as among the most inviolable of parliamentary privileges.”¹²

This institutional authority was mirrored in the Colonies’ legislative bodies. “As American colonial governments were established, provisions were written into their fundamental laws giving the colonial legislatures control over disputes involving their own membership.”¹³ For example, Virginia’s House of Burgesses considered a contested election in 1619 – more than four hundred years ago.¹⁴ By the time of the Constitutional Convention, “nearly every state constitution adopted” by that time “clearly recognized” the principle of reserving to legislative bodies the authority to decide the elections of their members.¹⁵ “The evidence is that all but two states incorporated in their state constitutions a provision saying that the legislature shall be the sole judge of election returns of its members.”¹⁶

At the Convention, “it seems not even to have been questioned that the House of Representatives should ultimately be the judge of the election of its own members” and the “idea that the House should possess this important privilege was thus accepted as a matter of course and accepted with the original conception of its justification.”¹⁷ By including it, “the framers of the U.S. Constitution simply incorporated a practice already widespread in the states.”¹⁸ The Constitution, “however, left open the question of how each house was to implement that authority.”¹⁹

B) The First Congress and the First Contested Election Case

With authority over each chamber’s elections assured by the Constitution, and perhaps reflecting the significance of the institutional prerogative in England, the very first standing committee formed by the House in the First Congress was the Committee on Elections, created within a month of the House organizing in the First Congress. That committee was tasked with reviewing election contests, with a mandate that “it shall be the **duty** of said committee to examine and report upon the certificates of election, or other credentials of the members returned to serve in this House, and **to take into consideration all such matters as shall or may come in question,**

¹⁰ C.H. Rammelkamp, *Contested Congressional Elections*, POL. SCI. Q., Vol. 20, No. 3, 421 (Sep. 1905).

¹¹ INST. FOR RES. IN PUB. SAFETY, AN ANALYSIS OF LAWS AND PROCEDURES GOVERNING CONTESTED ELECTIONS AND RECOUNTS: FINAL REPORT, VOL. I: THE FEDERAL PERSPECTIVE 14 (1978).

¹² C.H. Rammelkamp, *Contested Congressional Elections*, POL. SCI. Q., Vol. 20, No. 3, 421 (Sep. 1905).

¹³ INST. FOR RES. IN PUB. SAFETY, AN ANALYSIS OF LAWS AND PROCEDURES GOVERNING CONTESTED ELECTIONS AND RECOUNTS: FINAL REPORT, VOL. I: THE FEDERAL PERSPECTIVE 14 (1978).

¹⁴ *Id.* at 422.

¹⁵ C.H. Rammelkamp, *Contested Congressional Elections*, POL. SCI. Q., Vol. 20, No. 3, 422 (Sep. 1905).

¹⁶ INST. FOR RES. IN PUB. SAFETY, AN ANALYSIS OF LAWS AND PROCEDURES GOVERNING CONTESTED ELECTIONS AND RECOUNTS: FINAL REPORT, VOL. I: THE FEDERAL PERSPECTIVE 14 (1978).

¹⁷ C.H. Rammelkamp, *Contested Congressional Elections*, POL. SCI. Q., Vol. 20, No. 3, 422 (Sep. 1905).

¹⁸ INST. FOR RES. IN PUB. SAFETY, AN ANALYSIS OF LAWS AND PROCEDURES GOVERNING CONTESTED ELECTIONS AND RECOUNTS: FINAL REPORT, VOL. I: THE FEDERAL PERSPECTIVE 14 (1978).

¹⁹ INST. FOR RES. IN PUB. SAFETY, AN ANALYSIS OF LAWS AND PROCEDURES GOVERNING CONTESTED ELECTIONS AND RECOUNTS: FINAL REPORT, VOL. I: THE FEDERAL PERSPECTIVE 14 (1978) (emphasis original).

and be referred to them by the House, touching returns and elections, and to report their proceedings, with their opinion thereupon, to the House.”²⁰

Initially, the Committee on Elections “recommended that it play a strictly clerical role, wherein it would collect all available evidence and report it back to the chamber, so that the membership might decide on its merits.”²¹ The House “instructed the Committee on Elections to report back the facts of the case, as well as the evidence, so that the membership might more efficiently allocate its time.”²²

The Committee on Elections did not have to wait long to begin work: it reported its first contested election case before President George Washington had even been inaugurated as the nation’s first president.²³ In that case, the House considered a challenge to a new Member, William Loughton Smith of South Carolina, brought on the grounds that Smith had not “been seven Years a Citizen of the United States.”²⁴ Smith was born in South Carolina in 1758, when it was still a colony, and was sent to study in England and Geneva.²⁵ He returned to South Carolina after the war in 1783, began a career in politics, and was elected to the First Congress, with his term to begin on March 4, 1789.²⁶

However, David Ramsay, a delegate to the Continental Congress and South Carolina state legislature, challenged Smith’s election on the basis that he had not been a citizen of the United States for seven years.²⁷ Ultimately, the Committee on Elections and the full House upheld Smith’s election.²⁸ In addition to deciding the question of Smith’s claim to the seat and its significance for issues related to citizenship, the “case gave the House an opportunity to establish precedent for handling future contested elections: the Committee on Elections gathered evidence and rendered a judgment after which the House determined if more evidence was needed and, if not, voted on the committee’s report.”²⁹

C) The pre-Civil War era

With the House having exercised its constitutional authority to address elections contests immediately in the First Congress and having done so via the new Committee on Elections, in the Second Congress, the House “went a step further, instructing the Committee on Elections to sift through the evidence gathered and report back a recommendation on the case, that is, whether the

²⁰ 1 Annals of Congress 127 (Apr. 13, 1789).

²¹ Jeffrey A. Jenkins, *Partisanship and Contested Election Cases in the House of Representatives, 1789-2002*, 18 STUDIES IN AM. POL. DEV. 112, 113-114 (2004).

²² *Id.* at 114.

²³ Ofc. of the Historian, *The First House-Contested Election*, available at <https://history.house.gov/Historical-Highlights/1700s/The-first-House-contested-election/>.

²⁴ *Id.*; U.S. Const., art I., § 2.

²⁵ Thomas H. Lee, *Natural Born Citizen*, 67 AM. UNIV. L. REV. 327, 357-359 (2017).

²⁶ *Id.*

²⁷ *Id.*

²⁸ COMM. ON H. ADMIN, HISTORY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 1789 – 1994, 16, H. Doc. 103-324.

²⁹ Ofc. of the Historian, *The First House-Contested Election*, available at <https://history.house.gov/Historical-Highlights/1700s/The-first-House-contested-election/>.

House should rule in favor of the contestant (the individual contesting, or disputing, the election), the contestee (the individual holding the election certificate, who was typically seated), or neither (in which case the recommendation would be that the election, and the seat, be vacated).”³⁰ With that additional mandate and authority, “the Committee on Elections adopted informal, and irregular, procedures for taking testimony and collecting evidence.”³¹

However, in practice, this “informal mode of procedure would create difficulties, as requirements for gathering evidence and recording depositions tended to shift based on the whims (and partisanship) of individual committee members,” and lacked a more formal foundation.³² So, after a number of unsuccessful attempts in subsequent Congresses, in the Fifth Congress, Congress passed a law which “instituted a more formal mode of procedure: establishing the manner of serving summons on witnesses, the process of serving notification on the opposing party, the manner in which witnesses would be examined and testimony taken,” and other procedures.³³

When that 1798 law expired, it was renewed in 1800 and expired again in 1804.³⁴ That led to another cycle of unsuccessful attempts to pass a new law providing for a “uniform mode of procedure,” but no replacement legal framework was passed for decades.³⁵ In the meantime, the Committee on Elections relied primarily on “the practices and procedures in the States wherein the contests arose” in determining how to collect evidence and take testimony.”³⁶

Eventually, in 1851, Congress did succeed in creating a more comprehensive statutory framework to guide the consideration of election contests.³⁷ Under this new, more formalized regime,

the contestant was given thirty days after the election results were announced to provide formal notice, in writing, to the contestee. Moreover, the contestant was required to specify all grounds on which the contest was based. The contestee was then given thirty days to respond to charges made by the contestant, including an elaboration as to why the election was valid. Thus, within sixty days following an election, the issues under consideration were to be clearly articulated. The contestee and contestant would then have the next sixty days to take and transcribe testimony, which would upon completion, along with all other relevant materials, be sealed and sent to the House Clerk. The evidence would then, shortly after the commencement of a given congress, be printed and submitted by the House Clerk to the Committee on Elections.³⁸

³⁰ Jeffrey A. Jenkins, *Partisanship and Contested Election Cases in the House of Representatives, 1789-2002*, 18 STUDIES IN AM. POL. DEV. 112, 114 (2004).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Jeffrey A. Jenkins, *Partisanship and Contested Election Cases in the House of Representatives, 1789-2002*, 18 STUDIES IN AM. POL. DEV. 112, 114 (2004).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

This new framework would largely be “the guiding statute for settling contested election cases for more than a century,” until a new act was passed in 1969.³⁹ So, this law was the foundation in place when Congress entered a period of particularly significant contested elections activity.

D) Reconstruction and Black Representatives

Following the Civil War, “Black Representatives in the Reconstruction Era were profoundly affected by contested elections.”⁴⁰ During that time, according to a comprehensive history prepared by the House’s Office of History and Preservation at the direction of the Committee, “Black candidates still faced monumental electoral obstacles.”⁴¹ For example,

Violence and intimidation were commonplace during congressional campaigns . . . White supremacists threatened black voters and attacked the candidates during campaigns. The irregularities and confusion resulting from violent campaigns led to an influx of contested elections, and the House Committee on Elections handled an unusually heavy caseload during the Reconstruction Era.⁴²

In fact, 60 percent of cases the Committee on Elections heard “between 1867 and 1911 were from the former Confederacy – a percentage that is even more impressive given the Confederate states constituted around 25 percent of the House.”⁴³

When the Committee considered such cases, Members of the panel heard each candidate’s evidence asserting his right to the seat. The committee voted for its choice candidate and reported its findings to the whole House for a final vote. Usually, the candidate representing the majority party had a distinct advantage because votes within the committee and on the House floor were often decided along party lines.⁴⁴

During that time period, “A contested election prevented the seating of the first black man who won a congressional election.”⁴⁵ John Willis Menard won a special election in Louisiana with 65 percent of the vote, but his opponent contested the results, and the Committee on Elections declared the seat vacant.⁴⁶ When Menard defended his right to take office on the floor on February 27, 1869, he became the first Black man to address the House while it was in session.⁴⁷ A number of other Black candidates lost contested elections – some multiple times – while few prevailed.⁴⁸

³⁹ *Id.*

⁴⁰ OFC. OF HISTORY AND PRESERVATION, OFC. OF THE CLERK, BLACK AMERICANS IN CONGRESS, 1870-2007 30 H.R. Doc. No. 108-224 (2008) (prepared under the direction of the Comm. on H. Admin.).

⁴¹ OFC. OF HISTORY AND PRESERVATION, OFC. OF THE CLERK, BLACK AMERICANS IN CONGRESS, 1870-2007 29 H.R. Doc. No. 108-224 (2008) (prepared under the direction of the Comm. on H. Admin.).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ OFC. OF HISTORY AND PRESERVATION, OFC. OF THE CLERK, BLACK AMERICANS IN CONGRESS, 1870-2007 30 H.R. Doc. No. 108-224 (2008) (prepared under the direction of the Comm. on H. Admin.).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ OFC. OF HISTORY AND PRESERVATION, OFC. OF THE CLERK, BLACK AMERICANS IN CONGRESS, 1870-2007 30 H.R. Doc. No. 108-224 (2008) (prepared under the direction of the Comm. on H. Admin.).

For example, Josiah Walls – the first Black man to represent Florida in the House (and the only Black Representative from the state until the early 1990s) – was unseated twice following contests filed regarding elections in which he was initially declared the winner.⁴⁹ First, in the 1870 election, Walls, who had been born into slavery in 1842, defeated a former slave owner and Confederate veteran by 627 votes following a campaign in which Walls was nearly assassinated.⁵⁰ His opponent contested the election and alleged that canvassers had improperly rejected ballots in eight counties; Walls, in turn, alleged that he had “lost more votes due to voter intimidation by the Ku Klux Klan . . . but he had little tangible evidence to support this claim.”⁵¹ Although Walls was a Republican and Republicans controlled the House, ultimately the Republican majority sided with his Democratic opponent, “a rare case in which the committee decided with the candidate from the minority party.”⁵²

Walls ran again and was elected to the House in 1872 and narrowly won re-election in 1874, but again his opponent contested his election.⁵³ Walls was seated while the contest was pending and was allowed to speak briefly on the floor during debate on his right to the seat after the Committee on Elections recommended seating his opponent, but none of his six Black colleagues were allowed to speak during the two days of debate.⁵⁴ The House decided the contest in favor of his opponent, 135 to 84, with 71 abstentions.⁵⁵

John Mercer Langston became one of the first Black Americans to hold elected office when he won a local election in Ohio in 1855.⁵⁶ After holding a series of “prominent political and educational appointments, including establishing the law department at Howard University and receiving appointments from Presidents Ulysses S. Grant and Rutherford B. Hayes, Langston moved to Virginia and ran for the House in 1888.”⁵⁷

Langston’s campaign sent observers to “monitor every precinct for irregularities” and “instructed voters to say Langston’s name after voting, as evidence of their support.”⁵⁸ But separate lines for Black and White voters meant that Black voters “had to wait as long as three hours to vote,” ballots for Langston were allegedly removed from ballot boxes, and Langston’s observers were not allowed to witness the vote count.⁵⁹ After the initial results showed Langston

⁴⁹ OFC. OF HISTORY AND PRESERVATION, OFC. OF THE CLERK, BLACK AMERICANS IN CONGRESS, 1870-2007 88 H.R. Doc. No. 108-224 (2008) (prepared under the direction of the Comm. on H. Admin.).

⁵⁰ *Id.*

⁵¹ OFC. OF HISTORY AND PRESERVATION, OFC. OF THE CLERK, BLACK AMERICANS IN CONGRESS, 1870-2007 90 H.R. Doc. No. 108-224 (2008) (prepared under the direction of the Comm. on H. Admin.).

⁵² *Id.*

⁵³ OFC. OF HISTORY AND PRESERVATION, OFC. OF THE CLERK, BLACK AMERICANS IN CONGRESS, 1870-2007 90-91 H.R. Doc. No. 108-224 (2008) (prepared under the direction of the Comm. on H. Admin.).

⁵⁴ OFC. OF HISTORY AND PRESERVATION, OFC. OF THE CLERK, BLACK AMERICANS IN CONGRESS, 1870-2007 91 H.R. Doc. No. 108-224 (2008) (prepared under the direction of the Comm. on H. Admin.).

⁵⁵ *Id.*

⁵⁶ OFC. OF HISTORY AND PRESERVATION, OFC. OF THE CLERK, BLACK AMERICANS IN CONGRESS, 1870-2007 206 H.R. Doc. No. 108-224 (2008) (prepared under the direction of the Comm. on H. Admin.).

⁵⁷ OFC. OF HISTORY AND PRESERVATION, OFC. OF THE CLERK, BLACK AMERICANS IN CONGRESS, 1870-2007 208 H.R. Doc. No. 108-224 (2008) (prepared under the direction of the Comm. on H. Admin.).

⁵⁸ *Id.*

⁵⁹ *Id.*

losing by 641 votes, he contested the results. Although the Committee on Elections recommended finding Langston the victor in June 1890 – more than halfway through the 51st Congress – the whole House was delayed from hearing the contest for months while Democrats “repeatedly blocked the case from coming to a vote on the floor, primarily by vacating the chamber to prevent a quorum.” Finally, in late September 1890, the House voted to seat Langston 151 to 1 – with more than 90 percent of Democrats avoiding the floor in an attempt to against deny a quorum.⁶⁰

The same day the House voted to seat Langston, it then also voted to decide another contested election in favor of Thomas Miller, a Black candidate from South Carolina.⁶¹ Miller trailed in the vote count following the 1888 election, but he “contested the election, charging that many registered black voters were prohibited from casting their ballots” and protesting the state’s “eight box ballot law” as a scheme to confuse Black voters.⁶² After the vote to seat Langston, Miller was similarly seated, by a vote of 157 to 1, with many Democrats again trying to deny a quorum.⁶³

Because the House’s action came so late in the 51st Congress, Miller had only about a week of service in the House in Washington before he returned to South Carolina to run for re-election in the 52nd Congress.⁶⁴ Miller appeared to win the election, but his opponent challenged the results in court and the South Carolina Supreme Court sided with his opponent.⁶⁵ Miller then contested the election in the House.⁶⁶

However, while still serving in the 51st Congress, Miller spoke in favor of legislation “authorizing the federal government to oversee federal elections and protect voters from violence and intimidation, ignoring threats that his support of the bill would endanger his ability to win the pending election.”⁶⁷ When the Congress reconvened in the 52nd Congress, action on his contest was stalled until there was only one month left in the entire Congress, when the Committee on Elections decided in favor of Miller’s opponent.⁶⁸

In general, the “number of contested elections in the House increased dramatically in the late 19th century.”⁶⁹ One factor for the increase was that the nation “was nearly evenly divided between the two political parties; congressional majorities flip-flopped five times between 1870

⁶⁰ OFC. OF HISTORY AND PRESERVATION, OFC. OF THE CLERK, BLACK AMERICANS IN CONGRESS, 1870-2007 209 H.R. Doc. No. 108-224 (2008) (prepared under the direction of the Comm. on H. Admin.).

⁶¹ OFC. OF HISTORY AND PRESERVATION, OFC. OF THE CLERK, BLACK AMERICANS IN CONGRESS, 1870-2007 216 H.R. Doc. No. 108-224 (2008) (prepared under the direction of the Comm. on H. Admin.).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ OFC. OF HISTORY AND PRESERVATION, OFC. OF THE CLERK, BLACK AMERICANS IN CONGRESS, 1870-2007 216 H.R. Doc. No. 108-224 (2008) (prepared under the direction of the Comm. on H. Admin.).

⁶⁸ OFC. OF HISTORY AND PRESERVATION, OFC. OF THE CLERK, BLACK AMERICANS IN CONGRESS, 1870-2007 217 H.R. Doc. No. 108-224 (2008) (prepared under the direction of the Comm. on H. Admin.).

⁶⁹ OFC. OF HISTORY AND PRESERVATION, OFC. OF THE CLERK, BLACK AMERICANS IN CONGRESS, 1870-2007 162 H.R. Doc. No. 108-224 (2008) (prepared under the direction of the Comm. on H. Admin.).

and 1900.” Also, “contested elections ‘were the vehicle by which the Republican Party sought to preserve a party organization in the South during the nineteenth century.’”⁷⁰

One scholar has observed that “by the 1870s and 1890s, the Republican dominance in the North, which was consolidated during the Civil War, had ended,” the “use of contested elections was crucial to the continued Republican success in the House.”⁷¹ This was partly because, “[m]any of the strategic tools that Republicans used effectively throughout the late-nineteenth century, like redistricting, admittance of western states, and deployment of federal election officials were not effective in maintaining a Republican presence in the South.”⁷²

When “a Republican majority could influence the outcome, the party encouraged its candidates to contest, viewing contested elections as an ‘institutional equalizer’ for electing southern Republican Representatives to the House and maintaining a majority.”⁷³ Black candidates who were “loyal Republicans . . . enjoyed greater success in contesting their Democratic opponents’ victories before a Republican-controlled House during this period,” including Langston and Miller.⁷⁴

Throughout this period, the increase in contested elections “placed a considerable burden on members of the Committee on Elections.”⁷⁵ As a result, in the 54th Congress – with 38 contested election cases pending, 28 of which originated in the South – the Committee on Elections was “split into three separate panels named Elections #1, Elections #2, and Elections #3.”⁷⁶ This arrangement would remain in place until “the Legislative Reorganization Act of 1946 combined them under the jurisdiction of the Committee on House Administration.”⁷⁷

However, “After the 56th Congress (1899-1901), the use of contested elections as a partisan tool ended abruptly.”⁷⁸ Factors driving this change included (1) “many Republicans were not enthusiastic about its continued use as a partisan device,” in part because it was a time consuming process that detracted from time to spend on legislative priorities, (2) as a tactic to “maintain a Republican presence in the former Confederate South [it] was largely a failure,” since most of the Republicans who “successfully unseated Democrats via the contested election procedure were unable to build a base of support and maintain control of their districts,” and (3) “the changing electoral landscape in the late 1890s made the use of election contests as a partisan tool no longer necessary.”⁷⁹

⁷⁰ Jeffrey A. Jenkins, *Partisanship and Contested Election Cases in the House of Representatives, 1789-2002*, 18 STUDIES IN AM. POL. DEV. 112, 113 (2004).

⁷¹ *Id.* at 128.

⁷² *Id.*

⁷³ OFC. OF HISTORY AND PRESERVATION, OFC. OF THE CLERK, BLACK AMERICANS IN CONGRESS, 1870-2007 162 H.R. Doc. No. 108-224 (2008) (prepared under the direction of the Comm. on H. Admin.).

⁷⁴ *Id.*

⁷⁵ OFC. OF HISTORY AND PRESERVATION, OFC. OF THE CLERK, BLACK AMERICANS IN CONGRESS, 1870-2007 187 n.55 H.R. Doc. No. 108-224 (2008) (prepared under the direction of the Comm. on H. Admin.).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Jeffrey A. Jenkins, *Partisanship and Contested Election Cases in the House of Representatives, 1789-2002*, 18 STUDIES IN AM. POL. DEV. 112, 132 (2004).

⁷⁹ *Id.* at 132-134.

E) The FCEA and Modern Practice

The current framework for the House to consider contested elections is chiefly the product of two legislative modernization efforts in the mid-twentieth century. First, as part of a broader legislative reorganization, as noted above, the three Committees on Elections (as well as some other committees) were combined in the new Committee on House Administration, which has express jurisdiction over contested House elections.⁸⁰ This consolidation of the three former separate Committees on Elections contests ensured, among other things, that one committee with a common group of Members would be tasked with the jurisdiction and authority to review and consider election contests.

Second, in 1969, Congress passed the Federal Contested Election Act (FCEA), which lays out the procedure for candidates for the House of Representatives to contest an election. By that time, the 1851 law was more than a century old and reflected a very different era: when the House had only 231 seats, not 435, and when the nation had only 31 states, not 50. When that law was passed, the State of California was not yet one year old and the Civil War was still a decade away. So it was perhaps not surprising that, as one Member of the Committee put it in debate, the contested election statute was “antiquated and cumbersome” and its procedures were “unsuitable for the changed conditions of our time.”⁸¹

The FCEA was intended to “completely overhaul and modernize election contest procedures in the House,” by bringing those procedures “‘into closer conformity with the Federal Rules of Civil Procedure upon which the contested election procedures prescribed’ were based.”⁸² The Committee’s report “stressed it was ‘essential . . . that such contests be determined by the House under modern procedures which would provide efficient, expeditious processing of the cases and a full opportunity for both parties to be heard. Historical experience with the existing law had documented its inadequacies.’”⁸³

The changes made by combining existing authorities of other, older committees into the new Committee of House Administration and enacting the FCEA gave the Committee jurisdiction over elections contests and provided it with a statutory framework to help guide its work in this area, including the authority to examine election returns, procedures, ballots, and more in an elections contest case. As the Congressional Research Service puts it:

The FCEA, codified at 2 U.S.C. Sections 381-396, governs contests for the seats in the House of Representatives that are initiated by a candidate in the challenged election. The FCEA essentially sets forth and details the procedures by which a defeated candidate may contest a seat in the House of Representatives. The contest under the FCEA is heard by the Committee on House Administration upon the record provided and established by the parties to the contest. After the contest is heard by the committee, the committee reports the results. After discussion and

⁸⁰ COMM. ON H. ADMIN., A HISTORY OF THE COMMITTEE ON HOUSE ADMINISTRATION: 1947-2012 30 (2012).

⁸¹ *Id.* at 116.

⁸² *Id.* at 115.

⁸³ *Id.* at 116.

debate, the whole House can dispose of the case by privileged resolution by a simple majority vote.⁸⁴

Since the FCEA was passed, “*all* contested election cases in the House have been dealt with by the Committee on House Administration.”⁸⁵ Today, election contests remain a regular and expected part of the federal election cycle. In fact, every two years, as will be discussed in greater detail later in this memorandum, the Committee on House Administration works on a bipartisan basis to send election observers to congressional districts where there is reason to believe that the general election results may be particularly close, or susceptible to challenge. For the most recent general election in November 2022, the Committee sent observers to 22 districts in 10 states – identified by both Democrats and Republicans before the election – to proactively monitor elections for which there was a reasonable basis to expect that a contest might be filed. And as noted above, across our nation’s history, approximately 613 elections have been contested in the House – an average of more than 5 per Congress.

3) The Committee on House Administration’s Contested Election Observer Program

Every two years, the U.S. House of Representatives sends observers to congressional districts where there is reason to believe that the general election results for congressional district races may be particularly close, or susceptible to challenge, to monitor the administration of elections. It does so under the power granted to the House in Article I, Section 5 of the U.S. Constitution to “be the Judge of the Elections, Returns, and Qualifications of its own Members.”⁸⁶ The Committee on House Administration (the Committee), by virtue of its statutory and Rule X jurisdiction over contested House elections, manages the contested election observer program for the House. The role of these observers is limited strictly to observation and fact-finding, to serve as the contemporaneous “eyes and the ears” of the House in a given Congressional election.

The Committee has a long-standing practice of working collaboratively on a bipartisan basis to send observers to congressional districts as part of this program to proactively monitor congressional elections for which there was a reasonable basis to expect a contest might be filed. The observers serve on a voluntary basis and are employees of the House. There is evidence of the Committee sending observers in these circumstances in Committee summary of activities reports dating back to the at least the 97th Congress (1981-1983).

A) Purpose and Structure of the Contested Election Observer Program

Acting on behalf of the House, observers gather information with respect to the election they were sent to observe and report their findings to the Committee. Observers are typically sent after Election Day at the request of one of the candidates in the general election. Traditionally, observers are deployed in bipartisan teams, with a representative from the majority and the minority. Critically, they are sent as nonpartisan observers representing the House. They are not

⁸⁴ L. Paige Whitaker, Cong. Research Serv., RL33780, Procedures for Contested Elections in the House of Representatives 3 (Nov. 4, 2010), available at <https://sgp.fas.org/crs/misc/RL33780.pdf> (describing contest in which the House ignored the FCEA’s filing deadline).

⁸⁵ Jeffrey A. Jenkins, *Partisanship and Contested Election Cases in the House of Representatives, 1789-2002*, 18 STUDIES IN AM. POL. DEV. 112, 115 (2004) (emphasis original).

⁸⁶ U.S. CONST. art. I, § 5, cl. 1.

observing on behalf of any candidate or political party. As a result, only House staff can serve as observers, as their observer assignments are treated as a part of their official duties, even though they volunteer to participate in the program. To avoid conflicts, staff do not observe in the district of the member they work for.

Observers monitor any part of the voting counting process that is still in progress when they arrive, such as the validation and counting of absentee ballots, the canvass, the validation and counting of provisional ballots, and audits. Observers may also be sent to observe any recount conducted in congressional district races. The contemporaneous capture of the details of these procedures builds a strong evidentiary record in the event of a contest. The record from observers on behalf of the House is invaluable for the Committee as it evaluates the evidence presented by the parties in an election contest and the credibility of their claims, and determines whether a further investigation is warranted.

During federal election cycles, the Committee prepares for the possibility of a contested election by recruiting and training House staff as observers. Observers are instructed not to interfere with election officials in the performance of their duties, nor to influence the results in any way. They are, however, encouraged to ask questions to ensure that they fully understand the process they are observing.

Potential observers are provided with training that includes a brief overview of the contested elections process in the House, the stages of the election and post-election process, and details on what is expected of observers. Observers are told they will be assigned to vote counting locations, monitor the counting and certification process, and document any irregularities. They are instructed that their role is to record any information that may become helpful if a contest is filed and an investigation becomes necessary. After receiving an assignment, they are also provided with information on election laws and processes specific to the state and district to which they are assigned.

House staff benefit from their experiences observing. Many staff in Hill and District offices are removed from the electoral process. Participating in the contested election observer program provides staff with insight they likely would not have received elsewhere. It also provides a real-time opportunity to observe election administration practices and furthers Congress' legislative prerogatives under the Elections Clause to pass reforms to federal election laws.

As they are observing together, House staff from the majority and minority work together, building bipartisan relationships that would not have been forged otherwise. Many observers for the majority in 2022 coordinated with their minority colleagues to gather information during their observer assignments. At a time when Congress is becoming increasingly partisan, this bipartisan collaboration and relationship building is particularly valuable.

For decades, the contested election observer program has been an integral part of how the House executes its ultimate Constitutional authority to judge the qualifications of its Members. House staff who participate as observers travel around the country to congressional districts, where they work diligently and in a bipartisan manner to ensure the House has a contemporaneous and unbiased record of election administration in any district that may later be the subject of an election contest.

Every two years during the federal election cycle, the Committee devotes significant staff time and resources to supporting this program. In return, the contested election program provides the Committee not only with valuable information when considering election contests, but also important data on election administration in the states which can help shape the Committee's oversight and legislating of federal elections.

B) The Contested Election Observer Program in 2020

Prior to the 2020 general election, the Committee's Democratic majority staff trained over 200 observers from Committee and Member offices in preparation for the contested election observer program. With the unprecedented public health and safety challenges of the 2020 election, the highest priority of the Committee was to protect the health and safety of the observers during their assignments. The Committee staff coordinated with the Office of the Attending Physician, Employment Counsel, Office of the General Counsel, and House Security experts in preparation for observer program, and incorporated their suggestions into the program's processes and procedures. All observers were reimbursed for any Personal Protective Equipment they purchased as part of their assignment and were encouraged to follow the health and safety recommendations of the Office of the Attending Physician, including completing daily health screening before starting their assignments.

In 2020, the Committee majority and minority together sent 63 observers to 25 districts – at the request of both Democratic and Republican candidates – to proactively monitor elections for which there was a reasonable basis to expect that a contest might be filed. The number of observers requested for the 2020 election increased dramatically from the previous election—the Committee received over 2.5 times more requests for observers in 2020 than it did in 2018. In total, the Committee received 31 requests for observers in 2020, compared to receiving 12 requests in 2018.

Requests for observers came from races in Arizona, California, Georgia, Iowa, Illinois, Indiana, Michigan, Minnesota, New Jersey, Nevada, New York, Pennsylvania, Texas, Utah, and Virginia. Seven requests came from Democratic Candidates and the other 24 requests came from Republican Candidates. Some of the requests, however, were withdrawn before the Committee sent observers. Observers were sent to both of the congressional districts in which contests were eventually filed, Illinois's 14th Congressional District and Iowa's 2nd Congressional District, as well as many others.

For the 25 districts to which observers were deployed, the length of the deployments varied. Observer assignments started immediately after Election Day and the Committee had observers on the ground as late as January 2021 in New York's 22nd Congressional District, which was the last House race to be certified after litigation delayed certification.

C) The Contested Election Observer Program in 2022

Heading into the 2022 general election, the Committee majority staff trained nearly 200 observers from Committee and Member offices in preparation for the contested election observer program. The Committee received 24 requests for observation, with all requests coming from Republican candidates. The Committee majority and minority together sent bipartisan teams of

observers to 22 districts in 10 states⁸⁷ to proactively monitor elections for which there was a reasonable basis to expect that a contest might be filed. Observers were deployed to districts in Arizona, California, Colorado, Illinois, Maryland, New Jersey, New York, Oregon, Pennsylvania, and Virginia. For the 22 districts to which observers were deployed, the length of deployments varied. While the Committee received fewer observation requests compared to the 2020 general election cycle, the number of requests remained higher than most previous election cycles.

4) Conclusion

As shown in this memo, the House's judging power and the Committee on House Administration's observer program are essential tools that help ensure the integrity of federal elections for the House of Representatives. It is critical that the House continue to play this role in a professional and bipartisan manner so that the American voters can be assured that their elected representatives are truly chosen by and for the People.

⁸⁷ Of the 24 requests, 2 were withdrawn before the House put observers on the congressional districts.